TESTIMONY OF THE ST. REGIS MOHAWK TRIBE

United States Senate Committee on Indian Affairs

Committee Hearing

October 4, 2007

Interior Department: Land into Trust Applications, Environmental Impact Statements, Probate, and Appraisals and Lease Approval Backlogs at the Interior Department

I. Introduction

The Saint Regis Mohawk Tribe ("SRMT" or "Tribe") is pleased that the Senate Committee on Indian Affairs ("Committee") is holding this hearing to shed some much needed light on the very important matter of the Department of Interior's ("Department") backlog in processing fee-to-trust applications. The Tribe is submitting this statement to detail the background and status of our pending fee-to-trust application, which has been unreasonably placed on hold by Secretary Kempthorne. Given this egregious action, the Tribe hopes that our statement will assist the Committee in crafting solutions to the Department's growing backlog.

II. Background

The Tribe has been working for more than 10 years on a fee-to-trust application to acquire into federal trust status the 29.31 acre parcel at the Monticello Raceway in Monticello, New York for the Tribe's development of a casino project in accordance with Section 20 of the Indian Gaming Regulatory Act ("IGRA"), Public Law 100-497, and Section 5 of the Indian Reorganization Act ("IRA"). On December 21, 2006, the Department issued a "Finding of No Significant Impact" ("FONSI") indicating the Tribe has met the federal regulations for environmental review to have the land taken into trust status. On February 18, 2007, New York Governor Eliot Spitzer issued

the "concurrence" to the April 2000 favorable Section 20 Secretarial determination, thereby closing the Section 20 process.

As of today, however, there has been no final action by the Department on our application. We are reliably informed that Secretary Kempthorne has made it absolutely clear that he intends to indefinitely postpone the consideration of our application for reasons that he has not seen fit to share with the Tribe. Indeed, he has repeatedly refused even the courtesy of meeting with us to disclose the basis for his actions. If we could be made aware of his concerns, we would certainly do everything within our power to address them. Obviously, we can not know whether that is possible unless and until he agrees to meet with us or until he allows his subordinates to issue a final decision as they are required to do under the law.

III. Purposeful and Unwarranted Interior Department Delay of the Tribe's Application

The Tribe's fee-to-trust application is not only an example of the Departmental backlog of fee-to-trust applications, but it also appears to have been intentionally singled-out at the Department's highest level for extra-ordinary delay, resulting in the indefinite and unconscionable postponement of a final decision.

Our Tribe is certainly aware that every fee-to-trust application represents an Indian tribe's unique effort to replace its lost trust resources in order to provide land for economic development, housing, and the other desperately pressing needs of its members. In our view, it is hard to find

another application that will address so many needs as thoroughly as ours. This is certainly the reason that our application is supported so strongly by the State of New York and the local community where the land is located.

In our case, the Department's findings consistently demonstrate its recognition of the level of our Tribe's desperate need to address employment, housing, and other basic needs. These findings also recognize that approving our fee-to-trust application is the only alternative that is certain to address those needs. For example, when the Department issued the FONSI on our application, it focused directly on the fact that our fee-to-trust application was the only available alternative for addressing our needs:

> *The Tribe needs a stable economic base to address problems stemming from high unemployment, insufficient housing and inadequate health care.*[1]

> *The No Action Alternative was thoroughly considered [and rejected]. As evidenced by the financial success of other casinos and financial projections for the proposed casino, [however] this project clearly presented the best opportunity for a financially successful venture. The best long term employment opportunities are associated with the development of this proposed casino complex based on the projected long term financial stability of the project.*[2]

[1] Department of Interior, Finding of No Significant Impact for the Monticello Raceway Casino, December 21, 2006, at 2.

[2] *Id*. at 3.

The clarity of the Department's findings on these issues demonstrates that our application is not being denied –or even considered- on its own merits.

The Department's inexcusable delay is especially unfair because our Tribe has gone out of its way to play by the rules and follow the law. As noted above, our application has successfully and fully completed the Section 20 process, and is the subject of a FONSI. Although the Section 20 "two part" determination process authorizing Indian gaming on lands acquired after IGRA's enactment and the IRA process, primarily set forth in the 25 CFR Part 151 Regulations, to acquire land into trust status are two separate processes, there is significant overlap in their requirements.

The Tribe's fee-to-trust application has met all applicable requirements in accordance with both Section 20 of IGRA and Section 5 of the IRA, and its implementing regulations found at 25 CFR Part 151. All that remains is for the Department to make a final decision to acquire the land into trust. We are informed, however, that Secretary Kempthorne has personally intervened to stall our application apparently due to his personal views against "off-reservation" gaming. It appears now that the Secretary may not make any decision *at all* on our application, which has already caused significant harm to the Tribe. Most alarming to us is the fact that the Secretary will not meet with us to explain his justification for stopping our application, and has not responded to our numerous requests to meet with him.

Through IGRA, Congress enacted a general prohibition on gaming on lands acquired in trust after October 17, 1988 and provided certain exceptions to this prohibition, including the so-called "two part determination." Congress also explicitly provides in IGRA that neither the prohibition nor the exceptions are to be construed to alter the Secretary's authority to take land into trust:

> **2719 (c) Authority of Secretary not affected**
>
> Nothing in [Section 20] shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

It is very clear in our case that our application is being subjected to exactly the kind of discriminatory treatment that Congress anticipated –and sought to outlaw- when it enacted this provision. Without the direct assistance from this Committee and other members of Congress, this provision and the entire fee-to-trust process will become nothing more than a dead letter.

As the Committee can understand, the Tribe is losing faith that the Department's actions are guided by either the laws that Congress enacted or even its own regulations. By holding this hearing it is clear that this Committee shares our concern that laws enacted for the express purpose of addressing long-standing needs in Indian Country are simply not being implemented.

IV. Secretary Kempthorne Has Failed to Abide by the Pledges He Made During his Confirmation Process

With respect to our application, and perhaps others, Secretary Kempthorne is clearly not honoring the explicit commitment he made to this Committee and the United States Senate during his confirmation proceedings.

During his confirmation hearing, Mr. Kempthorne was explicitly asked whether he would separate his personal views about off-reservation gaming and apply the IGRA. Significantly, the question was directed to Mr. Kempthorne by New Mexico Senator Pete Domenici, who was then the Chairman of the Senate Energy and Natural Resources Committee –with jurisdiction over Mr. Kempthorne's nomination- as well as a member of this Committee. Senator Domenici specifically asked the nominee if he was confirmed whether he would faithfully implement Section 20, which places no geographic limitation on the location of off-reservation gaming facilities, as long as the Governor of the State concurs in the location. Mr. Kempthorne responded accordingly:

> "*I do not support reservation shopping. But if I am confirmed, the Department will continue to implement the provisions of Section 20 of the Indian Gaming Regulatory Act that permit off reservation gaming*."[3]

By improperly interfering the Tribe's application, Secretary Kempthorne is unquestionably allowing his personal view about what he called "reservation shopping" to over-ride his

[3] S. Hrng. 109-507, *To Consider the Nomination of Dirk Kempthorne to be the Secretary of the Interior*, May 4, 2006, at 61.

obligation to allow the Departmental decision-making process to take its course. His actions undermine applicable law, and violate his commitment to the Senate.

V. Questions and Answers About the Tribe's Application

Because the Tribe is not participating as a witness in the October 4, 2007 hearing, we have taken this opportunity to address some of the questions the Committee might have about our application.

Q. **May the Department render any decision with respect to the St. Regis Mohawk Tribe's fee-to-trust application other than approval**?

A. No. Based on the existing administrative record, the final findings of fact and conclusions in the December 21, 2006 Environmental Assessment ("EA"), the Finding of No Significant Impact ("FONSI"), the affirmative and completed Section 20 determination by the Secretary and the Governor, as well as the satisfaction of all requirements under the Part 151 process, any other decision other than an approval would be arbitrary and capricious and a breach of trust.

The Tribe's application has fully satisfied the two statutory prerequisites: Section 20 of the IGRA, and the Part 151 process under the IRA. Moreover, neither the EA/FONSI nor any other part of the administrative record provides adequate support for any decision other than

immediately approving the application. Accordingly, any other decision would constitute an abuse of discretion, as well as a breach of trust.

Q. **Does the Secretary of Interior have discretion to reconsider or revise the EA or FONSI ?**

A. No, the Department may only reconsider the issuance of the EA/FONSI if it demonstrates that a reviewing court would certainly determine that the EA/FONSI are so deficient that any decision that relies on these documents would necessarily be rendered arbitrary and capricious.

The issuance of an EA and a FONSI constitutes a final agency action, notwithstanding the possibility or even the likelihood of additional proceedings within an agency to resolve additional subsidiary issues.[4] The Department may only reconsider the EA/FONSI if it can conclusively demonstrate that a reviewing court would certainly determine that they are so deficient that any decision that relies on these documents would necessarily be rendered arbitrary and capricious.[5] Furthermore, because we are approaching the one year anniversary since the Department issued the EA/FONSI, the burden on the Department to demonstrate any deficiency

[4] Sierra Club v. Army Corps of Engineers, 446 F. 3d 808 (8th Cir. 2006).

[5] See, for example, Belville Mining Co. v. United States, 999 F.2d 989 (6th Cir. 1993), agency reconsideration was allowed only where the administrative record was: "so deficient a challenge would probably result in finding that the decision was unlawfully arbitrary and capricious."

in these documents has and continues to increase, and is now nearly insurmountable.[6] Finally, the Department is absolutely prohibited from revisiting the issuance of the EA/FONSI in order to retroactively apply a new or revised policy.[7]

Q. Do the factual findings and conclusions in the EA/FONSI now bind all subsequent actions by any employee or official within the Department of Interior, <u>including Secretary Dirk Kempthorne</u>.

A. Yes. Administrative decisions must bear a "rational connection between the facts found and the decision made."[8] Officials within the Department must base any actions or decisions on the clear and unambiguous factual findings and conclusions of the EA/FONSI.

The Court of Federal Claims ("CFC") recently cautioned the Department that the mere filing of a lawsuit that challenges the adequacy of the Department's environmental documentation for a project does not in any way alter or diminish prevailing administrative law, which requires that <u>all</u> decisions must be firmly grounded in a "rational connection" to the facts in the administrative

[6] <u>Rosebud Sioux Tribe v. Gover</u>, 104 F. Supp. 2d 1194, 1202 (D.S.D. 2000) reversed on other grounds *sub nom* <u>Rosebud Sioux Tribe v. McDivitt</u>, 286 F. 3d 1031 (8th Cir. 2002). Citing <u>Belville</u> and ruling that a five month interval between a decision and the agency's reconsideration rendered the reconsideration invalid.

[7] <u>Upjohn v. Pennsylvania RR Co.</u>, 381 F. 2d. 4, 6 (6th Cir. 1967), quoting <u>American trusting Associations v. Frisco</u>, 358 U.S. 133 (1958).

[8] <u>Kansas v. Norton</u>, 430 F. Supp. 1204, 1210 (D. Kansas, 2006).

record. Specifically, Rosebud Sioux Tribe v. United States,[9] concerned a Departmental effort to avail itself of the dubious expedient of reversing its previous approval of a tribal project in order to obtain dismissal of a NEPA-based challenge of a decision. As the government learned in that case, a decision to reconsider, revise or reverse an existing decision -or even to order additional environmental review- must itself be adequately supported by the applicable administrative record. In Rosebud, then-Assistant Secretary Kevin Gover sought to void a previously approved lease based on the ostensible inadequacy of the NEPA documentation, but his letter purporting to void the lease "fail[ed] to identify any specific shortcomings of the EA or to offer any reasonable basis for requiring the preparation of an EIS."[10] Both the United States District Court and the CFC independently concluded that Mr. Gover's action was per se invalid.

Q. Does the Department's proposed rulemaking implementing Section 20 of the IGRA provide a sound basis for the Secretary delay approval of or deny the Tribe's fee-to-trust application?

A. No. The February 18th letter signed by Governor Spitzer concurring with the April 2000 secretarial determination that the Tribe's fee-to-trust application for its Monticello casino project is both in the best interest of the Tribe and would not be detrimental to the surrounding community completely closes the Section 20 two-part determination process.

[9] 75 Fed. Cl. 15 (U.S. Fed. Cl. 2007).

[10] Rosebud Sioux Tribe v. United States, at 18, quoting Rosebud Sioux Tribe v. Gover, 104 F. Supp. 2d 1194 (D.S.D. 2000) *vacated on other grounds*, 268 F. 3d 1031 (8th Cir. 2002).

Therefore, any proposed new rule to implement Section 20 would not apply to the Tribe's application because its application is past this process.

Q. Is it a viable alternative for the Secretary to simply delay action on the Tribe's fee-to-trust application, and leave that decision to the next Administration?

A. No. The Secretary of the Interior and the Bush Administration should be held accountable to execute the laws, in accordance with the statutory directives and Congressional intent. The Tribe has fully met all of the legal requirements under both Section 20 of IGRA and the Part 151 Regulations under the IRA. Neither the IGRA nor the IRA provide the Secretary to discretion to deny or delay approving the Tribe's application based on a particular "shift in policy" or based on an official's personal views.

VI. Conclusion

At this stage in the consideration of the Tribe's fee-to-trust application, the Department's discretion has narrowed to such an extent that he can no longer disapprove the Tribe's application without disregarding the factual record for this matter. The Secretary can not "utter the words unique facts and circumstances . . . as a wand over an undifferentiated porridge of facts"[11] and pronounce a decision that utterly disregards the inexorable conclusions of the EA/FONSI. Accordingly, the record for our application limits the Secretary's discretion and mandates approval of the Tribe's application. Any other decision would constitute an abuse of discretion,

[11] Muweka Ohlone Tribe v. Kempthorne, 452 F. Supp. 2d 105, 119 (D.D.C. 2006), quoting Philadelphia Gas Works v. FERC, 989 F.2d 1246, 1251 (D.C. Cir. 1993).

as well as a breach of trust. Contrary to his commitments to the Senate, however, Secretary Kempthorne has decided to simply prevent his subordinates in the Department from rendering any decision on our application. Neither this Committee nor the Senate, nor the Congress should countenance such a brazen disregard for their authority and the law. Accordingly, we respectfully request that this Committee to inform Secretary Kempthorne that singling out gaming-related applications for interminable delays is contrary to the law and his commitment to the Senate. Furthermore that any further unwarranted delays will result in the Committee considering the means under its authority to compel the Secretary to render a final decision.

On behalf of our Tribe, we wish to thank the Committee again for holding this hearing.